87-1925

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. _____

IN THE MATTER OF GREENE COUNTY HOSPITAL, DEBTOR

PATH-SCIENCE LABORATORIES, INC. AND ITS SUCCESSOR AND ASSIGNS, SERGIO G. GONZALEZ, M.D., PA, Petitioner

v.

GREENE COUNTY HOSPITAL, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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May 19, 1988

QUESTIONS PRESENTED

1. Since Title 11, Section 109(c)(2) of the Bankruptcy Code requires a state political sub-division to be authorized by state law to file for bankruptcy, whether a bankruptcy court has jurisdiction over a case filed without authorization of state law.

2. Whether a bankruptcy court's order denying a motion to dismiss a bankruptcy case filed by a state political sub-division without state law authorization is a "final" order within the meaning of the Bankruptcy Code.

3. Whether the Decision below which held that a bankruptcy court's order denying the motion to dismiss the state political sub-division's case is not a "final" order, conflicts with the Decisions of the Third Circuit as to when a bankruptcy court's order should be deemed "final" within the meaning of the Bankruptcy Code.

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v.

GREENE COUNTY HOSPITAL, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Path-Science Laboratories, Inc. and its successor and assigns, Sergio G. Gonzalez MD PA respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court Of Appeals For the Fifth Circuit entered in this proceed-

ceeding on January 14, 1988, and the order denying a petition on suggestion for rehearing en banc entered on February 19, 1988.

OPINION BELOW

The opinion of the Court Of Appeals appears in the Appendix hereto.

JURISDICTION

The judgment of the Court Of Appeals For The Fifth Circuit was entered on January 14, 1988. A timely petition for rehearing en banc was denied on February 19, 1988, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Since Title 11 § 109(c)(2) of the Bankruptcy Code requires a state political sub-division to be authorized by state law to file for bankruptcy, whether a bankruptcy court has jurisdiction over a case filed without authorization of state law.

2. Whether a bankruptcy court's order

denying a motion to dismiss a bankruptcy case filed by a state political sub-division without state law authorization is a "final" order within the meaning of the Bankruptcy Code.

3. Whether the Decision below, which held that a bankruptcy court's order denying the motion to dismiss the state political sub-division's case is not a "final" order, conflicts with the Decisions of the Third Circuit as to when a bankruptcy court's order should be deemed "final" within the meaning of the Bankruptcy Code.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 11:

§109(c)(2).Who may be a debtor.

An entity may be a debtor under Chapter 9 of this Title if and only if such entity-

> (2) is generally authorized to be a debtor under such Chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such Chapter;

STATEMENT OF THE CASE

Greene County Hospital, owned by Greene County, Mississippi and located at Leakesville, Mississippi and operated by the County through a board of trustees, ran into financial difficulties and filed a petition in the Bankruptcy Court at Biloxi, Mississippi, seeking to reorganize under Chapter 11 of the Bankruptcy Code.

A creditor of the hospital, Path-Science Laboratories, Inc., a Mississippi corporation, and its successor and assigns, Sergio G. Gonzalez MD PA (Hereinafter referred to as "Gonzalez") had performed pathology services for the Hospital, which owed Gonzalez a substantial sum at the time it filed for bankruptcy.

Gonzalez filed a motion to dismiss the Hospital's bankruptcy petition, on the grounds that the bankruptcy court did not have jurisdiction as to the Hospital's case since the Hospital was not eligible to be a debtor under the provisions of the Bankruptcy Code.

Gonzalez based his contention on Title 11 provisions that state that only a person can file under Chapters 7 and 11, with "person" being defined to include natural persons and corporations, but not governmental units.

Gonzalez also maintained that Title 11 U.S.C. §109(c)(2) requires that a political sub-division of a state must obtain state authorization to be eligible to file for bankruptcy, and that Greene County Hospital was not eligible because the laws of the State Of Mississippi contain no such authorization. In other words, the Hospital was not eligible to be a debtor under the Bankruptcy Code.

Gonzalez had previously filed suit in the Circuit Court of Greene County, Mississippi, seeking payment of a past due promissory note of Greene County Hospital in the principal amount of $67,316.60 plus accrued interest in the amount of $7,192.25 and attorney fees in the amount of $16,829.15, all for a total of $91,338.00. The principal amount was the amount of the Hospital's account owed to

Gonzalez for the performance of pathology services for the Hospital.

Shortly after he filed suit, the Hospital filed for bankruptcy, and Gonzalez filed his motion to dismiss the bankruptcy petition on the premise that the bankruptcy court lacked jurisdiction for the reasons alluded to above.

A hearing on Gonzalez' motion to dismiss was held in the U. S. Bankruptcy Court in the Southern District Of Mississippi, Hattiesburg Division, Judge T. Glover Roberts presiding.

The Bankruptcy Court entered its Order denying Gonzalez's motion to dismiss, and in so doing found that the Hospital was not eligible under either Chapter 11 or Chapter 7 of the Code, but that it was eligible to file under Chapter 9, which provides for municipal reorganizations.

The Bankruptcy Court's order rejected Gonzalez's contention that Title 11 § 109(c)(2) precluded the filing, on the theory that the fact that a governmental unit can incur debts implies that the state has by implica-

tion authorized the governmental unit to file for bankruptcy.

Gonzalez appealed the Bankruptcy Court's Order to the United States District Court for the Southern District Of Mississippi, Hattiesburg Division, where the appeal was considered by U.S. District Judge Dan M. Russell, Jr., on briefs, without a trial or hearing.

Approximately one year later, on March 31, 1986, the District Court signed its memorandum opinion affirming the Bankruptcy Court's Order, and remanded the case to the Bankruptcy Court for further proceedings under Chapter 9 of the Bankruptcy Code. The Memorandum Opinion of the District Court was filed with the Clerk of the District Court on July 1, 1986.

On May 21, 1986 Gonzalez submitted a proposed final judgment to the District Court based on the Court's Memorandum Opinion signed on March 31, 1986, but the proposed judgment was not entered by the Court.

On May 23, 1986 Gonzalez filed a motion for judgment N.O.V. or in the alternative for

a new trial or hearing, and on June 23, 1986 the District Court entered its Order denying Gonzalez's motion for judgment N.O.V. or in the alternative for a new trial or hearing.

Gonzalez filed a timely appeal in the U.S. Court Of Appeals For the Fifth Circuit, seeking review of the Order of the District Court affirming the Order of the Bankruptcy Court, and of the District Court's Order denying the motion for judgment N.O.V. or in the alternative for a new trial or hearing.

Greene County Hospital is an unincorporated unit of Greene County, Mississippi and is governed by a board of trustees appointed by the Greene County Board Of Supervisors.

On June 19, 1948 Greene County, Mississippi purchased six acres of land located in the Town of Leakesville, Greene County, Mississippi, for the purpose of building thereon a county hospital.

Greene County then proceeded to build a hospital at an original cost of about $150,000.00.

In 1971 a $552,312 addition was constructed, and on July 2, 1984, shortly before it filed for bankruptcy, it awarded a contract to construct a new hospital for $1,027,000, which it did complete, after which it abandoned the old hospital.

The Greene County Hospital is a county-owned hospital built with funds from the sale of revenue bonds issued by the Greene County Board Of Supervisors.

It is operated as an unincorporated county agency, and has never obtained a non-profit or for-profit corporation charter from the State Of Mississippi.

Greene County has continuously operated the hospital since its opening in 1949, and the County has obligated itself to continue to operate the hospital under the covenants and provisions of various bond agreements.

Greene County Hospital filed its petition in Bankruptcy Court on September 26, 1984, seeking to effect a reorganization pursuant to Chapter 11, and a creditors' meeting

was scheduled and held on November 1, 1984.

At the creditors meeting a statement of financial affairs was circulated for the creditors to review, and the schedule of personal property showed total assets of $483,000 and the petition listed liabilities of $1,103,262.

At the creditors' meeting, creditors were told that the hospital did not own the real property consisting of the hospital building and land, but that Greene County owned it and leased it to the hospital.

However, bond issues reflecting funds owed by the County for the construction of the hospital buildings were listed as debts, but none of the real estate for the old or the new hospitals was shown in the petition.

The Court Of Appeals for the Fifth Circuit heard oral arguments on the question of the hospital's eligibility to file for bankruptcy, and on the Court's own motion asked for supplemental briefs on the question as to whether the Court Of Appeals had jurisdiction to hear the appeal from the District

Court's Order affirming the Order of the Bankruptcy Court that held that the hospital was eligible to file a bankruptcy petition.

While deliberating the case, one of the judges on the Court Of Appeals panel died, and the opinion was given by the other two members of the panel.

The panel's opinion held that the Bankruptcy Court's Order denying the Motion to dismiss filed by Gonzalez was not a "final" order, that the Appeals Court has jurisdiction only as to final orders and judgments, and that it, the Appeals Court, did not have jurisdiction to review the decision of the Bankruptcy Court.

It further stated that the District Court did not have jurisdiction to hear an appeal on Gonzalez's motion, again for the reason that only "final" orders and judgments are subject to review by an appellate court. The case was remanded back to the Bankruptcy Court.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE PROPER INTERPRETATION OF 11 U.S.C. §109(c)(2).

Both the Bankruptcy Court and the District Court agreed that Greene County Hospital could not file a bankruptcy petition under either Chapter 7 or Chapter 11 of the Code.

Both Courts agreed that the Hospital was eligible to file under Chapter 9.

Relief under Chapter 9 is not available to all governmental units, and the requirements for eligibility include the provision that the entity must be a political sub-division or public agency or instrumentality of a state.

A second requirement is found under 11 U.S.C. §109(c)(2), which requires that state law must have authorized the entity to be a debtor under Chapter 9.

This can be accomplished by a general authorization, or by empowering a governmen-

tal officer or organization to authorize the debtor to file for Chapter 9 relief.

Only sixteen (16) states specifically authorize their political sub-divisions to file. The states are Arizona, Arkansas, Califlornia, Florida, Idaho, Kentucky, Louisiana, Michigan, Montana, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina and Texas. Norton Bankruptcy Law & Practice Vol. 2, Part 47, Page 10.

A proposal under the Bankruptcy Reform Act Of 1978 would have permitted filing for Chapter 9 relief so long as it was not prohibited from doing so by the state, but this provision was modified, and the final version of the bill requires state authorization. 9 Am Jur 2d, Page 387, Note 37.

No Mississippi statute, case or other authority can be found that grants authority to its political sub-divisions to file for relief under Chapter 9.

For the Bankruptcy Court and the District Court to hold that implied consent meets the

requirements of Title 11 U.S.C. §109(c)(2) is an obviously inappropriate and improper interpretation that renders the requirement for state approval both ineffective and void.

Under this interpretation states lose all of their powers to regulate the ability of their sub-divisions to file for bankruptcy.

This clearly violates the plain and intended meaning of the requirement in the Bankruptcy Code that sub-divisions must obtain approval of state law to file for bankruptcy.

2. THE DECISION BELOW FURTHER CONFUSES THE QUESTION AS TO WHICH BANKRUPTCY COURT ORDERS ARE CONSIDERED AS "FINAL" SO AS TO RENDER THE ENTIRE ISSUE OF FINALITY CONSTITUTIONALLY VAGUE.

The cases in re: Delta Service Industries Debtor, et al vs W. Simmons Sandoz et al , 782 F 2d 1267 (5th Cir 1986) and County Management, Inc. Debtor, et al vs Kriegel, Receiver et al, 788 F 2d 311 (5th Cir 1986) were cited by the Court Of Appeals for consideration of the jurisdiction question based on

the finality of bandruptcy orders.

In Delta Service Industries vs Sandoz, supra, the questions involved whether an order approving the appointment of an interim trustee, and an order approving employment of counsel for the interim trustee, were final orders within the meaning of §158(d) of 28 U.S.C., which prescribes jurisdiction over bankruptcy appeals, and provides that the Court Of Appeals has jurisdiction only if the underlying bankruptcy court order was final.

As to the order approving appointment of an interim trustee, the Fifth Circuit found that the Seventh Circuit has recently held that an order appointing a bankruptcy trustee is interlocutory and unreviewable by a Court Of Appeals under §1293(b), stating that the district court's decision to appoint an interim trustee was only a preliminary factual determination and was not an ajudication on the merits of the dispute.

The Court then goes on to find the following types of bankruptcy court orders to

be such that they conclusively determine substantive rights of the parties and are final and appealable:

(a) An order allowing or disallowing an exemption is final because it conclusively determines whether the asset is part of the estate.

(b) An order dismissing an objection to the discharge of the bankrupt is final.

(c) An Order granting relief from automatic stay or requiring cash payment to provide adequate protection is final and appealable.

On the other hand, the Courts Of Appeals have considered bankruptcy court orders that constitute only a preliminary step in some phase of the bankruptcy proceeding and that do not directly affect the disposition of the estate's assets interlocutory and not appealable:

(d) An order authorizing a special master to negotiate the sale of assets is not final.

(e) An order denying application for approval of a settlement agreement is interlocutory and not appealable.

(f) An order denying confirmation of a Chapter 13 plan is interlocutory.

(g) An order denying the trustee's Conversion motion is interlocutory.

In Delta Service Industries, supra, the Fifth Circuit held that the bankruptcy court order approving the appointment of Sandoz as interim trustee constitutes only a preliminary step in Delta's liquidation.

However, as to the present case at bar, no comparable case is found in any Circuit.

The issue of whether the Greene County Hospital is eligible to file a petition without authorization of state law goes to the very heart of and merits of this case.

If either the Bankruptcy Court or the District Court had found that jurisdiction did not exist for the Hospital to file, a final judgment would have ended the case

on its merits, and would have obviously been a final order, determinative of all of the rights of all of the parties, and would have been subject to review by the court of appeals. Such an order would not be an interlocutory order, because it would end the litigation on the merits.

In County Management, Inc., supra, the issue involved a contention that the receiver was required to turn over property of the estate to the debtor-in-possession and render a complete accounting of all payments received.

The Fifth Circuit considered the basic issue of appellate jurisdiction on the Court's own motion, and recognized the rule that a final order must generally be one which ends the litigation and leaves nothing for the Court to do but execute judgment. It further stated that the order must conclusively determine substantive rights of parties in order to be final, and cites Delta Service Industries, supra, as the authority for these rules. The Fifth Circuit went on to say that the District

court's order fell far short of "finally resolving" the dispute between the parties.

In other words, the rights and liabilities of the parties were merely "sketched in pencil within a frame; much painting remains to be done." The Court went on to say that a remand for further factual finding simply is not a final order.

However, in the present case at bar, it is very clear that a decision in either the Bankruptcy Court, District Court, or Court Of appeals that would have held that Gonzalez's motion to dismiss should be sustained because the hospital is not eligible to file for bankruptcy, would have involved an issue the determination of which would have been a final determination of the rights of all of the parties. Nothing else would remain to be done. The litigation would have ended with the issuance of an order denying jurisdiction to Greene County Hospital, and such an order would not have been interlocutory.

3. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE THIRD CIRCUIT COURT OF APPEALS AS TO WHEN A BANKRUPTCY COURT'S ORDER SHOULD BE DEEMED TO BE "FINAL" WITHIN THE MEANING OF THE BANKRUPTCY CODE.

A split has developed between the Circuits over when such a dispute should be deemed over.

The Third Circuit holds that it is over when the Bankruptcy Court says it is, as is set forth in re Marin Motor Oil, Inc., 689 F 2d 445 (3rd Cir 1982), while the Fifth and Seventh Circuits hold that an order is final only when the district court so decides. In re Riggsby, 745 F 2d 1153 (7th Cir 1984); In re County Management, Inc. 788 F. 2d 311 (5th Cir 1986).

The Third Circuit holds that the finality of an order is determined by the character of the action in the bankruptcy court, while the Fifth and Seventh Circuits ask if the order of the bankruptcy court is final in character, and, if it is, if the remand by the district court requires extensive further proceedings.

In applying these principles to the case at bar, the Fifth Circuit acknowledged that a determination that a bankruptcy case may go on does affect the rights of the litigants, but that this appeal fails to rise to the level of a final order on both counts previously cited.

It states further that a remand by the district court in the present case leaves the entire bankruptcy proceeding before the parties, and that far from a ministerial task, the entire reorganization remains to be accomplished.

However, it is obvious that this would be so only if the district court or the court of appeals rules in favor of the Hospital...if Gonzalez's motion to dismiss for lack of jurisdiction is sustained, it is all over.

The Fifth Circuit Decision in this case makes the rule stand as follows:

> If a party who is not eligible under the Bankruptcy Code files for bankruptcy anyhow, that party cannot be

dismissed from the bankruptcy court unless the bankruptcy court dismisses the party. If the bankruptcy court fails or refuses to do so, the party can stay, eligible or not.

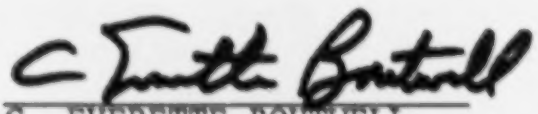
How can this be?

Finally, the correctness of the decision below is open to serious question. The law concerning the eligibility of a governmental unit to file a bankruptcy petition appears to be quite plain. None of the cases cited by the Fifth Circuit are on point with the present case at bar. Nor can any comparable cases be found on the exact point raised by this appeal. It is a question with far-reaching impact. Several other interested parties have been tracking the progress of this case from its inception, because it is a precedent-setting case. The Court Of Appeals has side-stepped the real issue of eligibility of a governmental unit to file for bankruptcy without state authorization, and in so doing has left the main question unanswered.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectively submitted,



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Rule 28.1 Disclosure

Parent companies, subsidaries and affiliates of the Petitioner: NONE

PUBLISHER'S NOTE:

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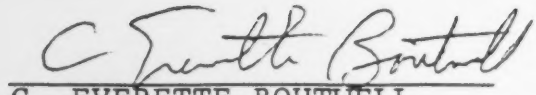
required to be served have been served.

Dated: May 19, 1988



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APPENDIX

Opinion

Judgment Of Court

Of Appeals

In the Matter of Greene County Hospital, Debtor.

PATH-SCIENCE LABORATORIES, INC. and its successor and assigns, Sergio G. Gonzalez MD PA, Plaintiff-Appellant,

v.

GREENE COUNTY HOSPITAL, Defendant-Appellee.

Nos. 86-4504, 86-4507.

United States Court of Appeals, Fifth Circuit.

Jan 14, 1988.

Creditor brought appeal of bankruptcy court order denying creditor's motion to dismiss bankruptcy petition for lack of subject matter jurisdiction. The United States District Court for the Southern District of Mississippi, Dan M. Russell, Jr., J., affirmed and creditor appealed. The Court of Appeals, Goldberg, Circuit Judge, held that denial of motion to dismiss was not a final order and Court of Appeals lacked subject matter jurisdiction over the

appeal.

Affirmed.

1. Bankruptcy key 3767

In order to be appealable, a bankruptcy court order must be final with respect to a "single jurisdictional unit." 28 U.S.C.A. §§ 158,1291.

2. Bankruptcy key 3767

In order to be final in character, an order by a bankruptcy court must resolve a discrete unit in the larger case. 28 U.S.C.A. §§ 158, 1291.

3. Bankruptcy key 3767, 3790

Court of Appeals lacked subject matter jurisdiction over creditor's appeal of denial of motion to dismiss bankruptcy for lack of subject matter jurisdiction, since order of bankruptcy court denying motion was not final in nature, so as to finally resolve rights of the litigants, and remand of the

matter by district court was such that extensive proceedings on the merits would be required. 28 U.S.C.A.§§ 158, 1291.

4. Bankruptcy key 3768

"Collateral order exception" to final order rule was inapplicable to order denying motion to dismiss bankruptcy proceeding for lack of jurisdiction. 28 U.S.C.A. §§158, 1291.

Appeals from the United States District Court for the Southern District of Mississippi.

Before JOHNSON and GOLDBERG, Circuit Judges.*

* Due to his death on October 19,1987, Judge Robert Madden Hill did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. § 47(d).

GOLDBERG, Circuit Judge:

To every thing there is a season.

Ecclesiastes, 3.1.

It isn't over till it's over.

In re Moody (Smith v. Revie), 817 F.2.d 365 (5th Cir. 1987) (quoting Yogi Berra).

A paradox of appellate jurisdiction is that the season begins only after the game has ended. In baseball, it is easy to tell when the game is over.[1]

1. A baseball games ends at the end of the first inning, after the eighth, that does not end in a tie.

In bankruptcy, Title 11 of the United States Code not only changes the rules of the game, it reshapes the concept of the game.[2] This case requires us to explore this new definition of the term "game", and then to redefine its end accordingly.

2. 28 U.S.C. §1291 governs jurisdiction of ordinary appeals from district courts. Under § 1291 the order must be final with respect to the case as a whole. 28 U.S.C. § 158(d) governs bankruptcy appeals from the district court to the court of appeals. As will be discussed later, to be apealable a bankruptcy order must also be final, but not as final. The order must only be final with respect to a discrete dispute within the larger case.

Dr. Gonzalez challenges the district court's determination that Chapter 9 of the Bankruptcy Code confers jurisdiction over the reorganization of an unincorporated municipal hospital on the bankruptcy court. We cannot reach this question because we lack subject matter jurisdiction. 28 U.S.C. § 158 limits circuit court jurisdiction to "final" orders of district courts. A district court's remand, affirming a bankruptcy court's determination that it has subject matter jurisdiction, is simply not a final order, even under the more liberal definition of the word "final" used in bankruptcy appeals. To find otherwise would allow piecemeal and dilatory appeal of inconsequential decisions while the strains of the Star Spangled Banner still echo.

We therefore affirm the order of the district court.

I. Facts

A. The Lineup

Plaintiff: Sergio Gonzalez, MD PA is the assignee of Path-Science Laboratories, Inc., a laboratory which provided diagnostic services to Greene County Hospital (the "Hospital"). Plaintiff holds a past due promissory note payable by the Hospital in the principal sum of $67,316.60.

Defendant: Greene County Hospital is an unincorporated unit of Greene County Mississippi (the "County"). The Hospital is governed by a Board of Trustees(the "Trustees"), appointed by the Greene County Board of Supervisors (the "Board of Supervisors"). The County purchased the land for the Hospital in 1948 and soon thereafter built the facility at an original cost of $150,000. The

The Hospital was expanded in 1976, and in 1984 the Board of Supervisors authorized a construction contract to build a $1,027,000 addition to the Hospital. The Hospital, built with funds from the sale of revenue bonds, is county owned. [3]

[3.] The issuance of such revenue bonds is now authorized by the Mississippi Legislature. Miss. Code Ann. 41-13-35(5)(k) (1972 and pocket part), gives the board of trustees of a municipal hospital the authority ot incur debt. That section provides that the "power of the board of trustess [of any municipal hospital] shall specifically include, but not be limited to...the...authority.. to borrow money and enter other financing arrangements for community hospital and related purposes."

Greene County is located in southeastern Mississippi. Of the County's 9,000 residents, 23% are unemployed and 78% receive some form of public assistance. The Hospital is the second largest employer in the County, second only to the school system. Nonetheless the Hospital has not received any operating funds from the County since 1982, and has been functioning in the nature of a charity hospital for a number of years. Not surprisingly, the financial condition of the Hospital has deteriorated substantially. Hospital revenues cannot satisfy the Hospital's debt load. Faced with imminent levy and execution by creditors, the Hospital has sought reorganization under Chapter 11 of the Bankruptcy Code.

B. The Pitch

Dr. Gonzalez filed a motion to

dismiss the Hospital's Bankruptcy petition, contending that the Hospital is not eligible to file for bankruptcy. The Bankruptcy Court held that the Hospital was not eligible to file under either Chapter 11[4] or Chapter 7[5] of the Bankruptcy Code but that it was eligible to file under Chapter 9 of the Code,[6] which covers adjustment of debts of municipalities. Plaintiff appealed the judgment of eligibility to the United States District Court for the Southern District of Mississippi. Judge Russell affirmed the Bankruptcy Court. Plaintiffs now appeal to the court challenging the jurisdictional determination of both the district court and the bankruptcy court.

4. 11 U.S.C. §§ 1101-1174.
5. 11 U.S.C. §§ 701-766.
6. 11 U.S.C. §§ 901-946.

II. Discussion

Neither plaintiff nor defendants raised the issue of this court's jurisdiction to hear this appeal, but federal courts must satisfy themselves as to their own subject matter jurisdiction.[7] We are convinced that a bankruptcy court's determination that it does have subject matter jurisdiction over a case is not a final order.

Jurisdiction over appeals from bankruptcy courts is governed by 28 U.S.C. § 158,, which provides:

> (a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy

7. This issue was first raised at oral argument, but both parties have filed supplemental briefs.

> judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title.
>
> ....
>
> (d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsection (a) .....of this section.

The parties may appeal all final orders of the bankruptcy judge to the district court as of right. The parties may also appeal final orders to the court of appeals as of right.[8] A district court may, in its discretion, take jurisdiction over interlocutory appeals from the bankruptcy court, but we have no such discretion. We have jurisdiction only

8. The Circuits are split over whether a final order of a bankruptcy court is appealable from a remand by the district court. See note 11 and accompanying text. A final order of the district court is always appealable. See note 9 and accompanying text.

over final orders.[9]

Our task is to explain why the order of the district court was not final. This is not a trivial task. Congress has amended the statute governing appellate jurisdiction over bankruptcy appeals twice in the last nine years.[10] Under the current

9. In re Moody (Smith v. Revie),817 F.2d 365, 366 (5th Cir.1987). In In re Delta Services, 782 F.2d 1267 (5th Cir. 1986) we pointed out that "We have jurisdiction only if the underlying order of the bankruptcy court was final." Id. at 1268. But an interlocutory appeal may gain finality at the district court level if the district court's order leaves nothing for the bankruptcy court to do but enter the final order. In re Bowman, 821,F.2d 245, 246, (5th Cir. 1987); In the Matter of Ben Hyman & Col, 577 F.2d 966(5th Cir. 1978).

The district court seems to have believed the order of the bankruptcy court to be final. Indeed after ruling, when plaintiffs asked the district court to reconsider his decision, the district judge instructed the parties that the next step in this lawsuit should be appeal to this court. The district court had the authority to hear the appeal regardless of whether the order was final. We do not.

statutory formulation two distinct approaches to be determining whether an order is final have emerged among the circuits,[11] and these competing

10. Appellate jurisdiction was originally governed by § 24(a) of the Bankruptcy Act of 1898 (the "Bankruptcy Act"), codified at 11 U.S.C. § 47(a)(repealed 1978). In 1978 the Bankruptcy Reform Act of 1978 (the "Bankruptcy Code") 92 Stat. 2549 (1978) replaced the Bankruptcy Act. Congress replaced § 24(a) with 28 U.S.C. § 1293, which adopted the "final order" approach of the present statute. After the Supreme Court held sections of the 1978 act unconstitutional, Northern Pipeline Co.v. Marathon Pipeline Co. 458 U.S. 50, 102, S.Ct. 2858, 73 L.Ed.2d 598 (1982), Congress amended the jurisdictional provisions to their present form. See 28 U.S.C.§158.

11. See in re Marin Oil, Inc. 689 F.2d 445, 449 (3d Cir. 1982), cert. denied, 459 U.S. 1207, 103 S.Ct.1196, 75 L.Ed. 2d 440 (1983);contra, In re Riggsby, 745 F.2d 1153 (7th Cir.1984). This Circuit follows the Seventh Circuit. In re County Management, Inc., 788 F.2d 311 (5th Cir. 1986); In Re Delta Services Industries, 782 F2d 1267 (5th Cir. 1986).

definitions of finality have not been explained with uniform conceptual clarity.

We do well to note at the outset that the difficulty of deciphering the law is not matched by the difficulty of deciding this case. This order is interlocutory under both current formulations, and would have been interlocutory under both former versions of the statute. To state our rationale, however, it is necessary to sort through the competing approaches to finality applied to orders of bankruptcy courts.

A. Appellate Jurisdiction Under The Bankruptcy Act of 1898 - Laying Out the Ground Rules

When a baseball umpire makes a difficult call, the text of the applicable rule is not as important as simply knowing how to play the game. Similarly, to understand the text of the current

provisions of the bankruptcy law, it is necessary to understand how the game was played prior to the Bankruptcy Reform Act of 1978.[12]

1. Controversy and Proceeding - Games Within the Game

There is a long history of interlocutory appeal of certain kinds of disputes in a bankruptcy case. Until 1978, §24(a) of the Bankruptcy Act of (1898)(the "Bankruptcy Act") governed appellate jurisdiction over disputes in bankruptcy. The section provided that:

> The United States courts of appeals.... are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy either interlocutory or final and in controversies arising in proceedings in

12. 92 Stat. 2549 (1978).

bankruptcy, to review, affirm, revise or reverse both in matters of law and in matters of fact.

11 U.S.C. § 47(a)(repealed 1978). Courts read this provision as allowing interlocutory appeals to circuit courts as of right in "proceedings in bankruptcy" ("proceedings") but allowing appeal as of right only from final orders in "controversies arising in proceedings in bankruptcy" ("controversies"). [13] The "distinction" between 'proceedings' and 'controversies'....long eluded concise and easily ascertainable definition." In re Durensky, 519 F.2d 1024 (5th Cir.1975). Courts commonly distinguished between questions regarding administration of the estate and questions as to whether certain property

13. Wright, Miller, Cooper and Gressman, Federal Practice and Procedure § 3926 at 103.

ought to be included in the estate. Id. at 1028; see United Kingdom Mutual S.S. Assur. Assoc. v. Liman, 418 F.2d 9,10 (2d Cir. 1919).

For all the intricacy of the proceeding/ controversy distinction, though, § 24(a) allowed the possibility of a tremendous number of interlocutory appeals. As one recent court, applying the old provision put it.

> section 24(a) creates the prospect that most of the hundreds of orders that a court issues in the course of a protracted reorganization....are appealable as a matter of right.

Matter of Chicago, Milwaukee, St. Paul & P.R. Col, 756 F.2d 508, 511 (7th Cir.1985).

The present dispute would have been characterized as a proceeding. In Durensky when faced with the determination of subject matter jurisdiction by a bankruptcy judge. [14] "we believe that it is

as clear as anything can be in this terminological morass that the instant case constitutes a proceeding."

2. Interlocutory Finality-Playing Games with Trivial Proceedings

Motivated by a policy against piecemeal appeals, the courts developed a "trivial order" exception. This exception imported notions of finality into the jurisdictional requirement for appeal from orders in proceedings in bankruptcy. Orders were held to be trivial when they failed to finally

14. In Durensky the government argued that the bankruptcy court had no jurisdiction "to determine the amount and legality of federal taxes due and owing by a bankrupt.....where the United States has filed no claim in the bankruptcy proceeding." 519 F.2d at 1028.

15. Id.

resolve the rights at issue.[16] Again, we said in Durensky.

> [T]he Government's motion to dismiss ....would surely be an appealable order in view of our determination that this case is a proceeding in bankruptcy. Such a sweeping conclustion would be ill-advised however, for the courts of appeals have interpreted section 24a so as to allow appeals from interlocutory orders in proceedings only when the orders dispose of some right or duty

16. Appeals from proceedings were held to be trivial for several reasons: (1) because they were truly trivial, In re W.F. Breuss, Inc., 586 F.2d 983, 987-89(3rd Cir.1978)(dissent); (2) because no matter of bankruptcy administration was involved. In re Continental Investment Corp.,637 F.2d 1,4(1st Cir.1980); and finally and most importantly,(3) because the order did not definitively resolve the issue on which appellate review was sought, and was therefore trivial in its consequences. In re Durensky, 519 F.2d 1024, 1029 (5th Cir. 1975); In re Bacchus, 718 F.2d 736 (5th Cir. 1983); In re Abingdon Realty Corp., 634 F.2d 133 (4th Cir.1980); In re Lloyd, Carr & Co., 614 F.2d 17,20(1st Cir.1980); Good Hope Refineries v. Brashear,588 F,2d 846,848 (1st Cir. 1978).

asserted by one of the parties.(citations omitted)

The obvious explanation for this judicial gloss on the statutory language is that if every word issuing from the bankruptcy judge's mouth or pen were to be a proper subject for immediate view... bankruptcy proceedings would cease to offer reasonably swift resolution of pressing economic difficulties.(citations omitted)

This Court has consistently ruled that in order for an interlocutory order in a bankruptcy proceeding to be appealable as of right, it must possess a "definitive operative finality." 519 F.2d at 1028-29(emphasis added). This requirement of "definitive operative finality" rendered the distinction between controversies and proceedings substantially less important. In proceedings as well as controversies, the

order had to be final with respect to the rights at issue. This finality variant of the trivial order exception was noted as having the potential to eliminate interlocutory bankruptcy appeals.[17]

Thus from the jurisprudence under the old Bankruptcy Act two important concepts emerge, the concept of the proceeding as the relevant jurisdictional unit and the concept of finality as a prerequisite to appealability of bankruptcy orders. But, the legal analysis in cases applying these concepts was far from clear, and a judicial gloss had substantially changed the understanding of the statutory language.

17. "It may well be that appellate distaste for interlocutory review will gradually expand the trivial order exception." 16 Wright, Miller, Cooper and Gressman, Federal Practice and Procedure § 3926 at 108. "Under this open-ended approach, large numbers of orders could be found inherently open to reconsideration, and denied appeal." Id. at 109.

B. Playing the Same Games Under The New Rules

When the Bankruptcy Code was enacted in 1978 and amended in 1984, the drafters of the Code solidified the two trends that had been developing in the case law. First, Congress abolished the distinction between controversies and proceedings, which was disappearing as a functional matter anyway. Second, Congress made the requirement of finality explicit. Under the amended statute, courts of appeals have jurisdiction only over "final decisions, judgments, orders and decrees." 28 U.S.C. §158. Section 158 replaced a nearly identical provision, 28 U.S.C. § 1293(a)[18] which was in turn patterned on the general final order rule of 28 U.S.C.

18. § 1293(b) states: "[A] court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of a District court of the United States..."

§ 1291.[19] In Re County Management, Inc. 788 F.2d 311, 313, n.2 (5th Cir.1986). The case law that has grown up around this new provision has recognized that §1291 and § 158 do not give the same meaning to the same language.

Many courts have referred to the more flexible notions of finality included in the traditional bankruptcy jurisprudence, and have noted that § 158 "finality" is not the same as §1291 "finality." This statement is true only in part, and reflects a failure to separate the concept of relevant jurisdictional unit from the concept of finality - to separate the definition of the game itself from the definition of the end of the game.

19. 28 U.S. C. § 1291 says: "The courts of appeals....shall have jurisdiction of appeals from all final decisions of the district courts of the United States..."

1. Proceeding and Case-The Relevant Jurisdictional Unit is the Name of the New Game.

[1] To be appealable an order must be final with respect to a "single jurisdictional unit." 788 F.2d at 313. Section 158 does away with the proceeding/controversy distinction, but it offers no further guidance as to the relevant jurisdictional unit which does apply. For the purposes of § 1291, the single jurisdictional unit is the case as a whole. In re Saco Development Corp., 711 F.2d 441 (1st Cir. 1983), however, Judge Breyer pointed out that

> Although Congress has defined appellate bankruptcy jurisdiction in terms..similar to those appearing in other jurisdictional statutes...the history of prior federal bankruptcy law and the 1978 Act convinces us that Congress did not intend the word "final" here to

> have the same meaning- at least not with respect to the application of the traditional "single judicial unit rule."

Id. at 444, The court further noted,

> Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case.

and concluded,

> In sum, given a longstanding Congressional policy of appealability, an uninterrupted tradition of judicial interpretation in which courts have viewed a "proceeding" within a bankruptcy case as the relevant "judicial unit" for purposes of finality, and a legislative history that is consistent with this tradition, we conclude that a "final judgment, order or decree"...

includes an order that conclusively determines a separable dispute over a creditor's claim or priority.

Id. at 445-446. See In re Moody(Smith v. Revie), 817 F.2d at 363; Levin, Bankruptcy Appeals, 58 N.C.L. Rev. 967, 985(1980) (the relevant unit is called, "a proceeding arising under Title 11." (emphasis added)).

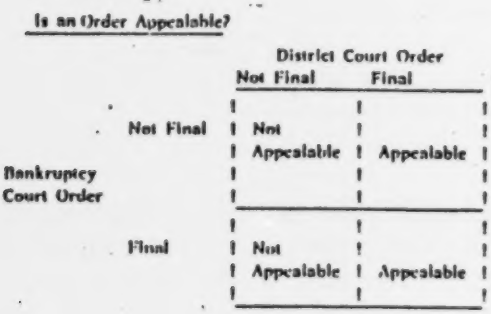
The circuit courts agree that proceedings are the relevant unit and no dispute has arisen over whether a given order is a product of a proceeding or something less. In this circuit a case certainly "need not be appealed as a single judicial unit" at the termination of the proceeding as a whole. In re County Management, Inc.,788 F.2d 311,313 (5th Cir.1986).

C. The End of the Game-Defining Finality

But a split has developed between the

Circuits over when such a dispute should be deemed over. The Third Circuit holds that the game is over when the bankruptcy court says it is, In re Marin Motor Oil, Inc.,689 F.2d 445(3rd Cir. 1982), while the Fifth and Seventh Circuits hold that the game ends only when the district court says it is. In re Riggsby, 745 F.2d 1153 (7th Cir.1984); In re County Management, Inc.,788 F.2d 311 (5th Cir. 1986).[20]

[20] The split in circuits can be represented graphically. The law of this circuit can be depicted as follows:



In Marin Oil, the Third circuit allowed an appeal in a case where the bankruptcy court denied a creditor's committee's motion to intervene, in spite of the fact that the district court reversed and remanded, because they determined that the finality of an order is determined by the character of the action of the bankruptcy court.

In the Third Circuit, the law is as follows:

Is an Order Appealable?

Bankruptcy Court Order	District Court Order: Not Final	District Court Order: Final
Not Final	Not Appealable	Appealable
Final	Appealable	Appealable

In this case, both the district court and the bankruptcy court agreed that the bankruptcy court had jurisdiction. The question therefore is whether under any circumstances a court's determination that it has subject matter jurisdiction can be a final order.

This is not the approach followed in this Circuit. As Judge Rubin said, in In Re Moody(Smith v. Revie, 817 F.2d 365 (5th Cir.1987) when determining that a turnover order by the bankruptcy court was a final order. [21]

> For the purpose of Yogi Berra's celebrated maxim, "The game isn't over till it's over," a bankruptcy proceeding is over when an order has been entered that ends a discrete judicial unit in a larger case.

Id. at 368. For the order to be appealable, the game must really be over. To determine whether a remand by a district court really signals the end of the game, we must follow a two step

[21] Note that this would have involved a controversy under the old law rather than a proceeding and therefore appeal would only have been available if this was a final order anyway.

inquiry. First, we must ask whether the order of the bankruptcy court itself is final in character. Matter of Moody,825 F.2d 81 (5th Cir.1987), and second, if it is, we must ask if the remand by the district court requires extensive further proceedings. In Re County Management, 788 F.2d at 314. The answer to the first question must be in the affirmative while the answer to the second question must be in the negative.

1. Character of the Order

[2] In order to be final in character, an order by a bankruptcy court must resolve a discrete unit in the larger case. The character of the bankruptcy court's order determines whether appeal is available as of right to the district court. A final order must "conclusively determine substantive rights." In Re Delta Services Industries, 782 F.2d 1267, 1271 (5th Cir. 1986). For example, in In Re County

Management a bankruptcy court order granting defendant's motion for summary judgment and dismissing a complaint was appealed to the district court as of right. 788 F.2d at 312. Dismissal of a complaint obviously ends a dispute. See also, In Re Bowman, 821 F.2d 245, 246 (5th Cir.1987)(dismissal of complaint as untimely filed appealed to district court). A bankruptcy court's recognition of a creditor's security interest is a final order. In Re Lift & Equipment Service,Inc., 816 F.2d 1013, 1015,(5th Cir. 1987). Such an order conclusively establishes a claim against the estate. Similarly a turnover order, ordering an individual to turn over an antique coin, is final, settling authoritatively the inclusion of a piece of property in the estate. In Re Moody, 817 F.2d 365 (5th Cir.1987) [22]

"On the other hand, the courts of appeals have considered bankruptcy court orders that constitute only a preliminary step in some phase of the bankruptcy proceeding and that do not directly affect the disposition of the estate's assets interlocutory and not appealable." In Re Delta Services Industries, 782, F.2d at 1270-71. Thus an order appointing an interim trustee is not final, Id. An order requiring the winding up of a partnership prior to the final turnover order is not final. Matter of Moody, 825 F.2d81(5th Cir.1987).[23]

[22] Other circuits have consistently followed this approach, In Re Delta Services, 782 F.2d at 1270; accordingly, an order allowing or disallowing an exemption is final; an order dismissing an objection to discharge of the bankrupt is final; and an order granting relief from the automatic stay is final. Id.

[3] Applying these principles to the facts of this case, the question is whether a bankruptcy courts order denying a motion to dismiss for lack of jurisdiction is final. Of course a determination that a bankruptcy proceeding may go on does not affect the rights of the litigants. But our inquiry on this point is controlled by precedent in this circuit. In County Management the issue of subject matter jurisdiction was raised before the bankruptcy court, and on appeal and was held not to be a ground for jurisdiction over the appeal;

15. Other circuits have applied this theory as well; an order authorizing a special master to negotiate a sale of assets is not final; an order denying application for approval of a settlement agreement is not final; an order denying confirmation of a chapter 13 plan is not final; and an order denying a trustee's conversion motion is not final. In Re Delta Services, 782 F.2d at 1271.

Defendants in their brief to this court have dusted off their argument that the bankruptcy court did not have subject matter jurisdiction of this dispute. Even if we were to infer that the district court actually reviewed the merits of defendant's motion in the bankruptcy court to dismiss for lack of subject matter jurisdiction and determined that it was properly denied - a dubious proposition in light of the wording of their brief to the district court-it is clear that the denial of a motion to dismiss for lack of subject matter jurisdiction is not a final order. Catlin v. United States, 324 U.S.229 [65 S.Ct.631, 89 L.Ed.911] (1945) (parallel cites omitted) (motion to dismiss, even on jurisdictional grounds, not immediately reviewable absent exceptional circumstances).

788 F.2d at 313-14 n.3. This is not to say that Dr. Gonzalez wil never be able to have his challenge to the jurisdiction of the bankruptcy court determined by this court. As we said in Durensky:

> An order denying a motion to dismiss for lack of jurisdiction is perhaps unique in its incapacity permanently to affect the rights of the moving party, for jurisdictional defects may be recognized by a court at any time, on the motion of the parties or on its own motion.

In re Durensky, 519 F.2d 1024, 1029(5th Cir. 1975). Gonzalez must simply await an appeal from some order of the bankruptcy court that actually resolves his rights with finality.

2. Nature of The Remand

Our conclusion is bolstered by the fact that even Dr. Gonzalez had reached the end of the game in the bankruptcy

court, the remand by the district court does not meet the level of finality required in this circuit. A remand from the district court reversing a final order of the bankruptcy court may itself be deemed final if it leaves only a ministerial task for the bankruptcy court. In Re County Management, Inc. 788 F.2d at 314. Accordingly, in In Re Moody, 817 F.2d 365(5th Cir. 1987), a turnover order was deemed final even though additional proceedings would be necessary in order to enforce that order. Similarly, in In Re Lift & Equipment Service,Inc., 816 F.2d 1013(5th Cir.1987), where nothing more than "the bankruptcy court's review of the scheduled expenses," was required, the order was deemed final. Id. at 1016.

Here, by way of contrast, the entire bankruptcy proceeding remains before the parties. Far from a mere ministerial task,

the entire reorganization remains to be accomplished.

Thus this appeal fails to rise to the level of a final order on both counts. The order of the bankruptcy court was not final in nature, and the remand of the district court is one that will require extensive proceedings on the merits.

3. The Collateral Order Exception Does Not Apply

[4] Appellants also contend that this case fits within the collateral order exception to the final order rule. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). To fit within the collateral order exception, "an order must at a minimum satisfy three conditions: [1] it must 'conclusively determine the question,' [2] 'resolve an important issue completely separate from the merits of the action,' and [3] 'be effectively unreviewable

on appeal from a final judgment." Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 105 S.Ct.2757, 2761 86 L.Ed.2d 340 (1985) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978)). This argument fails under the third prong of this test. The question of subject matter jurisdiction is far from unreviewable on appeal from final judgment. When there is a final judgment in this case appellants will be free to raise the issue of subject matter jurisdiction yet again.

III. Conclusion

For these reasons, the judgment of the district court is Affirmed.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

January 14, 1988

TEL.504-589-6514
GILBERT F. GANUCHEAU 600 CAMP STREET
CLERK NEW ORLEANS, LA 70130

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Nos. 86-4504 and 86-4507 - Path-Science Laboratories vs. Greene County Hospital

---

Enclosed is a copy of the Court's decision this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41 FRAP and Local Rules 39 and 41 govern costs, petitions for rehearing and mandates. A petition for rehearing must be filed in the Clerk's Office within fourteen (14) days from this date. Placing the petition in the mail on the 14th day will not suffice.

Criminal Appeals. Local Rule 41 provides that "A motion for a stay of the issuance of a mandate in a direct criminal appeal filed under FRAP 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

Court-Appointed Counsel Cases. This Court's plan under the Criminal Justice Act provides

that in the event of affirmance or other decision adverse to the party represented, appointed counsel shall promptly advise the party in writing of the right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court and shall file such petition if requested to do so in writing by such party.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By: Betty G. Martinez
Deputy Clerk

Enclosure

cc: Mr. C. Everette Boutwell
Mr. Robert A. Byrd

OP-JDT-1
Rev. 11/86

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 86-4504
86-4507

U.S. COURT OF APPEALS
FILED
FEB 19 1988
GILBERT F. GANUCHEAU
CLERK

In the Matter of GREENE COUNTY HOSPITAL, Debtor.

PATH-SCIENCE LABORATORIES, INC. and its successor and assigns, Sergio G. Gonzalez, MD PA,

Plaintiff-Appellant,

versus

GREENE COUNTY HOSPITAL,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion January 14, 5 Cir., 1988, ____F.2d____)

(February 19, 1988)

Before GOLDBERG and JOHNSON, Circuit Judges.*

PER CURIAM:

(✔) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel

nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court naving been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Steve Johnson 2-15-88
United States Circuit Judge REHG-8

*Due to his death on October 19, 1987, Judge Robert Madden Hill did not participate in this decision. The case is being decided by a quorum. U.S.C §46(d).

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

March 1, 1988

TEL.504-589-6514
GILBERT F. GANUCHEAU 600 CAMP STREET
CLERK NEW ORLEANS, LA 70130

IN THE MATTER OF:
GREENE COUNTY HOSPITAL
No. 86-4504 -PATH-SCIENCE, ETC. v. GREENE -COUNTY HOSPITAL
No. 86-4507 -PATH-SCIENCE, ETC. V. GREENE COUNTY HOSPITAL
(D.C. No. CA-H-85-0224-'R")
(BKCY #808120-HC)

✔ Enclosed to you only is a certifed copy of the judgment of this Court in the above case issued as and for the mandate.

___ Enclosed to you only is a certified copy of the Rule 47.6 Decision in the above case issued as and for the mandate.

___ The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

___ Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

___ We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's

judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

✔ Copy of the Court's opinion.

___ Original record on appeal or review.
____Volumes.

___ Other Original papers forwarded with record.____Envelope ____ Box.

___ Bill of Costs approved by this Court.
___ Copy enclosed to counsel.

cc: (Letter Only)

Hon. Dan M. Russell,Jr.

Mr. C.Everette Boutwell ✔

Mr. Robert A. Byrd

Sincerely,

GILBERT F. GANUCHEAU, Clerk

By: H. E. Adams, Jr.
Deputy Clerk

P.S. TO CLERK:
THE RECORD ON APPEAL WILL BE RETURNED SHORTLY.

MDT-1

Rev. 10/86

(2)

No. 87-1925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

In The Matter of GREENE COUNTY HOSPITAL, Debtor.

PATH-SCIENCE LABORATORIES, INC., and its successor and assigns, Sergio G. Gonzalez, M.D., P.A.,

Petitioner

V.

GREENE COUNTY HOSPITAL,

Respondent

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NICHOLAS VAN WISER
ROBERT BYRD & ASSOCIATES
P. O. Drawer 1939
Biloxi, Mississippi 39533
(601) 432-8123

Counsel for Respondent

QUESTION PRESENTED

Whether the decision below by the United States Court of Appeals for the Fifth Circuit conflicts with a decision by the United States Court of Appeals for the Third Circuit in *In re Marin Motor Oil, Inc.*, 689 F.2d 445 (3rd Cir. 1982) and, if so, whether such conflict should constitute a ground for granting Petitioner's writ of certiorari.

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TABLE OF CITATIONS

No. 87-1925

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

In The Matter of GREENE COUNTY HOSPITAL, Debtor.

PATH-SCIENCE LABORATORIES, INC., and its successor and assigns, Sergio G. Gonzalez, M.D., P.A.,

Petitioner

V.

GREENE COUNTY HOSPITAL,

Respondent

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

By its petition, the petitioner, Path-Science Laboratories, Inc., and its successor and assigns, Sergio G. Gonzalez, M.D., P.A., ask this Court to grant a writ of certiorari to review the Judgment and opinion of the United States Court of Appeals for the Fifth Circuit in *In re Greene County Hospital*, 835 F.2d 389 (5th Cir. 1988).[1]

---

1. Respondent, Greene County Hospital, has no parent company, subsidiaries or affiliates.

I

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 14, 1988. A timely petition for rehearing en banc was denied on February 19, 1988, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

II

QUESTION PRESENTED

Whether the decision below by the United States Court of Appeals for the Fifth Circuit conflicts with a decision by the United States Court of Appeals for the Third Circuit in *In re Marin Motor Oil, Inc.*, 689 F.2d 445 (3rd Cir. 1982) and, if so whether such conflict should constitute a ground for granting Petitioner's writ of certiorari.

III

STATEMENT OF THE CASE

The Respondent, Greene County Hospital, agrees with the statement of the case contained in the petitioner's petition.

IV

REASONS FOR DENYING CERTIORARI

1.

NO CONFLICT BETWEEN DECISIONS

The decision below in this case does not conflict with the decision of the United States Court of Appeals for the Third Circuit in *In re Marin Motor Oil, Inc., supra*. In contending that there is a conflict between the decision below and the Third Circuit's decision in *In re Marin Motor Oil, Inc., supra*, the petitioner points to the difference in method used by the Third Circuit and the Fifth Circuit in deciding when a district court's order affirming or reversing a bankruptcy court's order is final and therefore appealable.

As pointed out in the Fifth Circuit's decision in this case, there is a difference in the methods used by the two circuits to determine appealability of district court orders which rule upon bankruptcy court orders. The existence of such a difference does not mean that this Court should grant certiorari to review the decision in this case. Rule 17 of this Court's rules provides that this Court will consider granting certiorari when a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter.

The decision of the Fifth Circuit in this case is not in conflict with the decision of another federal court of appeals on the *same matter*. The Third Circuit's decision in *In re Marin Motor Oil, Inc., supra*, dealt with the appealability of a district court's order reversing a bankruptcy court's refusal to permit a creditors' committee to intervene in an adversary proceeding instituted by the Trustee. The Fifth Circuit's

decision in this case dealt with the appealability of a district court's order affirming a bankruptcy court's denial of a creditor's motion to dismiss a bankruptcy petition for a lack of subject matter jurisdiction. Had the Third Circuit's decision dealt with the same fact situation and had an opposite decision been reached regarding appealability, then the decision of the Fifth Circuit in this case would be in conflict with the decision of the Third Circuit on the *same matter*. That is not the case here. As a result, there is no conflict between the decisions of two federal courts of appeals which would require this Court to even consider granting certiorari to review the Fifth Circuit's decision in this case.

2.

ANY CONFLICT WHICH EXISTS DOES NOT CONCERN AN IMPORTANT FEDERAL QUESTION

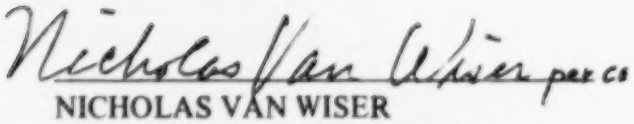
If any conflict is present between the Fifth Circuit's decision in this case and the Third Circuit's decision in *In re Marin Motor Oil, Inc., supra*, it is represented by the conflict between the method used by the Fifth Circuit and the Third Circuit to determine appealability of district court orders which affirm or reverse bankruptcy court orders. Conflict among the circuits as to the method used for making such a determination does not impair the uniformity of decision where uniformity is significant. A conflict among the circuits as to an important federal question is not presented. As a result, if a conflict is indeed present, certiorari should not be granted in this case.

V

CONCLUSION

For the above and foregoing reasons, this Court should refuse to grant a writ of certiorari to review the Judgment and opinion of the Fifth Circuit in this case.

Respectfully submitted,



NICHOLAS VAN WISER
ROBERT BYRD & ASSOCIATES
P. O. Drawer 1939
Biloxi, Mississippi 39533
(601) 432-8123

Counsel for Respondent

CERTIFICATE OF SERVICE

I, NICHOLAS VAN WISER, do hereby certify that I have this day mailed, postage prepaid, three copies of the Response to Petition for Writ of Certiorari to C. Everette Boutwell, Esquire, P.O. Box 4448, Laurel, MS 39441.

This the 31st day of August, 1988.

Nicholas Van Wiser per cc

NICHOLAS VAN WISER